IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 32 OF 1996

1. Sohel Janmuhammed Memon)
2. Salim Janmuhammed Memon)
3. Masud Janmuhammed Memon)
4. Zubeda Ismail Memon)
5. Shahnawaz Sohel Memon)
6. Lubna Masud Memon)
7. Tasneem S. Memon)
8. Hamidabai J. Memon)
9. Yasim Ismail Khan)
[All above residents of Flat 3-A,)
Navjeevan Building, 2nd Floor,)
Napeansea Road, Bombay) ....Petitioners.

V/s

State of Maharashtra)....Respondents.

Mr. S.V. Marwadi for the Petitioners.

Mrs. M.H. Mhatre, APP for the State.

CORAM: V.M. KANADE, J.

DATE : 1st September, 2006

ORAL JUDGMENT:

1. Heard the learned Counsel appearing on behalf of the petitioners and the learned APP for the State.

2. Petitioner is challenging the order passed by the Metropolitan Magistrate, 14th Court, Girgaum, Bombay in Case No. 174-S of 1994 whereby the the application filed by the Petitioners/accused for discharge has been rejected.

3. Brief facts are as under :-

4. A complaint was lodged by P.S.I. Balasaheb Shinde on 29/4/1993 at Gamdevi Police Station in which it was alleged that the accused had committed an offence punishable under section 5 of the Bombay Money-Lenders Act, 1946 and the Bills of Exchange amounting to Rs 6,25,000/- were seized from accused No.1 after the house of accused No.1 was searched. It is alleged that accused had issued Bills of Exchange in respect of the amount which was given as a loan to one Sohel Yakub Khandwani. It is alleged that the

said Khandwani was engaged in construction business and that they had taken loan from the family of the accused and the amount of Rs 6,25,000/- mentioned in the Bills of Exchange was received by him @ 15% per annum after deducting interest for a period of three months. The charge-sheet was filed against the accused. After the charge-sheet was filed, an application was preferred by the accused for discharge which was rejected by the learned Metropolitan Magistrate.

5. The learned Counsel Shri Marwadi appearing on behalf of the Petitioners has submitted that the provisions of section 5 read with section 34 of the Bombay Money-Lenders Act, 1946 are not attracted in the present case in view of the specific provisions of section 2(9) of the Bombay Money-Lenders Act which excludes certain transactions from the purview of section 5 of the Bombay Money-Lenders Act. He submitted that, in the present case, the Petitioners had issued Bills of Exchange and, therefore, the said transaction would not be termed as "loan" within the meaning of the Bombay Money-Lenders Act, 1946. In support of the said

submission, he relied upon the judgment of this Court in the case of Nandram Kaniram and Others Vs. N.B. Rahatekar reported in **1994(1) Bom. C.R. 28.** He also relied upon the judgment of this Court in the case of Sitaram Laxminarayan Rathi Vs. Sitaram Kashiram Koli and Others. Reported in **1985 Mh.L.J. 430.** He further relied upon the Judgement of this Court in the case of Fulchand Champalal Jain Vs. Punjaru Shankar Patil and Others reported in **1987(3) Bom. C.R. 175.** He also relied upon the Division Bench Judgment of this Court in the case of Bhanushankar Jatashankar Bhatt Vs. Kamal Tara Builders Pvt. Ltd and another reported in **1989(2) Bom. C.R. 526.**

6. The learned APP appearing on behalf of the State, however, vehemently opposed the said submissions. She submitted that, at this stage, it was not possible to arrive at a conclusion that the accused had issued Bills of Exchange against the monies advanced. She submitted that this finding could be arrived at only after the evidence is led. She submitted that, therefore, there was no error committed by the learned Magistrate in rejecting the application for

discharge. She submitted that, therefore, there was no reason to interfere with the impugned order in the Revision Application which was filed by the Petitioners.

7. In the present case, it is an admitted position that after the house of the Petitioners was raided, several documents which were essentially termed as Bills of Exchange for an amount of Rs 25,000/- were seized. These Bills of Exchange were issued in favour of members of the family of the Petitioners. The total amount of Bills of Exchange is Rs 6,25,000/-. All these Bills of Exchange (Hundies) exceed a sum of Rs 3000/-.

8 Section 5 of the said Act imposes a bar for carrying on business of money lending except on a licence which has been issued and according to the terms and conditions in the said licence. Breach of section 5 is made punishable under section 34. It would be relevant to consider the provisions of section 5 and section 34 of the said Act, 1946 which read as under:-

“5. Money-lender not to carry on business of money-lending except for area under licence and except in accordance with terms of licence.- No money-lender shall carry on the business of money-lending except in the area for which he has been granted a licence and except in accordance with the terms and conditions of such licence.”

“34. General provision regarding penalties.- Whoever fails to comply with or acts in contravention of any provision of this Act, shall, if no specific penalty has been provided for in this Act, be punishable-

(a) for the first offence with simple imprisonment which may extend to one year or with fine which may extend to Rs 5,000/- or with both, and

(b) for the second or subsequent offence with imprisonment of either description which may extend to two years or with fine which may extend

to Rs 1,000 or with both."

9. However, section 2(9) specifically excludes certain transactions. Section 2(9)(f) clearly excludes the advance which is made of a sum exceeding Rs 3000/- on the basis of a negotiable instrument as defined under the Negotiable Instruments Act. Section 2(9)(f) of the Bombay Money-Lenders Act, 1946 reads as under:-

> "2(9) "loan" means an advance at interest whether of money or in kind but does not include -
>
> (a).....
> (b).....
> (c).....
> (d).....
> (e).....
> (f) an advance of any sum exceeding rupees three thousand made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881 (XXVI of 1881), other than a promissory note;"

10. A perusal of the aforesaid provisions clearly indicates that any transaction which is based on a Negotiable Instrument, is excluded from the purview of section 5 of the said Act, 1946. In the present case, admittedly, Bills of Exchange (Hundies) for a sum exceeding Rs 3000/- have been recovered from the Petitioners. That being the admitted position, the said transaction is clearly saved by the provisions of section 2(9)(f) of the Act, 1946.

11. The validity of section 2(9)(f) was challenged in this Court and the Division Bench of this Court in the case of Bhanushankar Jatashankar Bhatt (supra) upheld the validity of section 2((9)(f) in the said case.

12. Thereafter, in catena of cases this Court has consistently taken a view that where an advance is given to the reputed or known traders through Hundi Dalal, the said advance cannot be termed as a money- lending transaction. In the case of Sitaram Laxminarayan Rathi (supra), the learned Single Judge of this Court, while examining the provisions of section 2(9)(f) and section 6 of the Negotiable

Instruments Act, has held that a post-dated cheque is a Negotiable Instrument and is not a loan as defined in the Bombay Money-Lenders Act, 1946 and that the provisions of the said Act were not applicable in respect of such advance. In the case of Fulchand Champalal Jain (supra), the learned Single Judge of this Court, while examining the provisions of section 2(9)(f) and section 80 of the Negotiable Instruments Act and construing the document in which there was no stipulation of payment of interest and no promise to pay, held that the document was not a pro-note and that such a transaction was not a loan within the meaning of section 2(9)(f). Though the aforesaid two judgments in the case of Fulchand Champalal Jain and in the case of Sitaram Laxminarayan Rathi are not directly on the point raised in this Criminal Revision Application, yet, in both these cases, from the perusal of the documents, the Court has held that the advance which was given was not a loan within the meaning of section 2(9). In the case of Nandram Kaniram & Ors (supra), the advance was made on the basis of post-dated cheque. The learned Single Judge held that the provisions of section 2(9)(f) were clearly attracted. In the

present case also, Hundies have been drawn in the name of all the Petitioners for a sum exceeding Rs. 3000/- and, therefore, the said transaction was clearly saved by virtue of section 2(9)(f) from the clutches of the Bombay Money-Lenders Act, 1946. The learned Magistrate erred in relying on the judgment of the Supreme Court in the case of Gajanan and others Vs. Seth Bridaban reported in AIR 1979 SC 2007 since the issue involved in the said case was entirely different. The point involved in the said case was, whether a person registered as money-lender in one District could enter into an isolated transaction of money lending on the basis of mortgage in different district. The learned Magistrate did not take into consideration the provisions of section 2(9)(f).

13. In the result, Criminal Revision Application is allowed. The impugned Order dated 24/08/1995 passed by the Metropolitan Magistrate, 14th Court, Girgaon, Bombay is set aside. The proceedings in Case No. 174-S pending in the court of the Metropolitan Magistrate, 14th Court, Girgaum, Bombay are quashed and set aside.

14. Criminal Revision Application is accordingly disposed of.

(V.M. KANADE, J.)